

Kelly v Alarco

2007 NY Slip Op 33466(U)

October 17, 2007

Supreme Court, Nassau County

Docket Number: 2115-06/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

DANIEL KELLY and CHRISTINA DIFILIPPO,

Plaintiffs,

TRIAL/IAS, PART 6
NASSAU COUNTY

INDEX No. 2115/06

MOTION DATE: Aug. 17, 2007
Motion Sequence # 002, 003

-against-

MICHAEL ALARCO, an infant over the age of fourteen years, by his parents and natural guardians HONORATO ALARCO and ROSEMARY ALARCO, HONORATO ALARCO, individually, ROSEMARY ALARCO, individually, LINDA HERNANDEZ, FELIX HERNANDEZ, BRIAN HERNANDEZ, an infant over the age of fourteen years, by his parents and natural guardians, LINDA HERNANDEZ and FELIX HERNANDEZ, ERIC HERNANDEZ, MICHAEL KLEIN, an infant over the age of fourteen years, by his parents and natural guardians, PAUL KLEIN and MARY KLEIN, PAUL KLEIN, individually and MARY KLEIN, individually,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affirmation in Opposition..... XX

Supplemental Affirmation in Further Support.. X
 Reply Affirmation XX

This motion, by defendants, for an order:

- (I) pursuant to CPLR Rule 3212, granting defendants Felix Hernandez, Linda Hernandez, Brian Hernandez and Erik Hernandez s/h/a above (collectively “the Hernandez defendants”) summary judgment dismissing the Complaint and all cross-claims against them;
- (II) pursuant to CPLR §603 and Rule 3212(e)(1), severing the action against the Hernandez defendants from the remaining actions; and
- (III) granting such other and further relief as to this Court may appear just, proper and equitable;

and a cross motion, by the Klein defendants, for an order granting defendants Paul Klein and Mary Klein summary judgment dismissing the complaint and for such other and further relief as this Court deems just and proper, are **both** determined as hereinafter set forth.

FACTS

The case at bar is a personal injury claim in which the plaintiff, Daniel Kelly, sustained injury to his right eye as a result of an incident that occurred on Halloween, October 31, 2004. The incident involved the defendants Eric Hernandez (“Eric”), Michael Klein (“Klein ”), and Michael Alarco (“Alarco”), who were minors of high school age at the time. Earlier that evening, the three defendants along with two of their friends not parties in this action, met and then set out for Eric’s home. An altercation took place, over a very short period of time, and plaintiff was struck in the eye by a paintball while seated in his automobile parked in the street. During the exchange, Linda stood at the front door of the house and shouted something to the crowd. It is unclear as to what she actually said. Defendant Felix Hernandez (“Felix”), father of Eric and Brian, and husband of Linda was at work and not on the premises during the event. Felix purchased the paintball gun owned by Brian.

DEFENDANTS' HERNANDEZ CONTENTIONS

The moving defendants contend that they did not proximately cause the injury suffered by the plaintiff. The defendants believe that because of Alarco's involvement in criminal proceedings regarding the plaintiff's injury, it is established that Alarco was the shooter who caused the injury, and the plaintiff cannot establish liability on the part of any of the Hernandez defendants and the complaint and all cross-claims against the Hernandez defendants should be dismissed as a matter of law.

Defendant Felix Hernandez contends that he should not be held liable for the injuries sustained by the plaintiff on the basis that he wasn't aware of Alarco's visit or of his violent propensities and cannot be held liable for negligent supervision. Felix also argues that he is not liable under negligent entrustment because there is no evidence that the paintball gun he purchased for Brian was negligently operated or even operated at all that evening. Finally, Felix contends that he could not have been acting in concert with Alarco because he was not present and therefore could not have agreed to a common plan to commit a spontaneous tortious act.

Brian Hernandez contends that he was not outside of his home when plaintiff's injury occurred and that he did not bring the air tank outside for Klein's gun. For purposes of this motion, Brian argues that if he did bring out the air tank for Klein's gun, it was brought out before the spontaneous act of the egg-throwing began and therefore could not have been in pursuance of a common plan or design. Brian claims he did not commit a tortious act and was only trying to fix Klein's gun before the altercation began.

Linda Hernandez contends that she only became aware of Michael Alarco's possession of a paintball gun that evening during the altercation. She claims that she yelled at both Alarco and the crowd across the street to stop. For purposes of the motion, Linda argues that if she did say "get them," that it is too speculative to interpret what she intended. Moreover, because the egg throwing was spontaneous and unexpected, Linda contends she had no time to plan an attack on the plaintiff, further weakening the concerted action claim. Linda also contends that the cause of action for negligent supervision must fail because Linda had no prior notice of Alarco's violent propensities and had no opportunity to physically stop Alarco from firing his gun.

Eric Hernandez contends he is also entitled to judgment in his favor, in that he did not urge Alarco to continue shooting, nor did he offer Brian's air tank to Michael Klein for

his paintball gun. For purpose of this motion, Eric argues that even if he did ask Brian to attach his tank to Klein's gun, the action for negligent entrustment should fail because Klein had never fired his gun. Moreover, Eric contends that the concerted action claim should be dismissed because he did not commit any tort. The egg throwing was wrong and spontaneous and precluded the possibility for Eric to form a common plan or design. Therefore, the complaint and all cross-claims against Eric should be dismissed as a matter of law.

KLEIN DEFENDANTS' CONTENTIONS

Paul and Mary Klein ("Kleins"), parents of Michael Klein, contend that the action against them should be dismissed because they were unaware that Michael had removed the paintball gun from their home on the date of the incident; that they had strict rules on the use of the gun and that it was only to be used in facilities designed for use of the gun. Michael had violated his parents' rules when he took the gun from his home on that date; and they were unaware Michael had taken the gun, therefore they did not negligently entrust him with a dangerous instrumentality. They contend that there is no proof that, the offending paintball gun was operated by Michael. Moreover, the Kleins argue that since there is no legitimate cause of action against Michael, that they cannot be liable for negligent entrustment.

PLAINTIFF'S OPPOSITION TO THE HERNANDEZ MOTION

Plaintiff contends that the conflicting deposition testimonies raise issues of fact which require a jury trial, i.e., what Linda yelled to the crowd; whether Eric urged Alarco to continue firing his weapon at the plaintiff; and whether Brian retrieved his paintball gun or part of the gun. Plaintiff asserts that, assuming the Hernandez' met their initial burden of proof establishing entitlement to judgment the plaintiff can still successfully defeat the summary judgment motion under landowner liability and concerted action liability. Because Felix was not present at the time of the tortious behavior, plaintiff concedes that any individual claims as to Felix should be dismissed.

Under the landowner liability theory, the plaintiff contends that Linda had a duty to prevent harm to others on her premises; including a duty to control conduct of third parties on a landowner's premises when she has the opportunity to control such persons and are reasonably aware of the need for such control. Because Linda was aware that the boys were present on her front stoop, and was aware that paintball guns were in their possession when she observed the attack, she had the opportunity to control the behavior on the premises to prevent an injury. Therefore, Linda's failure to act as a reasonable landowner makes her

liable.

Under the concerted action liability theory, the plaintiff asserts that Linda, Brian, and Eric are liable. Plaintiff argues that deposition testimony has demonstrated that Klein, Alarco, and Eric participated in the attack. By yelling “get them,” Linda encouraged the attack, and by retrieving his gun or part of gun to assist Klein, Brian has taken part in the attack. Moreover, since Eric urged Alarco to continue the attack, he is further implicated under the concerted action theory.

PLAINTIFF’S OPPOSITION TO THE KLEIN MOTION

Plaintiff contends that the Kleins are liable under negligent entrustment even though they were unaware of Michael’s possession of the paintball gun on the date in question. Mrs. Klein’s credit card was used to purchase the gun, she consented to its purchase, and both parents had full knowledge of the ownership of the gun. As a result, they have violated §265.05 of the Penal Law (to allow a person under the age of 16 to possess any spring gun, air gun, or other instrument in which the propelling force is air), which constitutes negligence per se and therefore liability under negligent entrustment. Moreover, since Michael Klein has not moved for dismissal that implicitly establishes a cause of action against Michael. Therefore, since there is a triable issue of fact as to Michael’s liability, the Kleins may still be liable for negligent entrustment.

DEFENDANTS’ HERNANDEZ REPLY

Counsel contends that the plaintiffs’ attempt to demonstrate a factual issue falls short of the mark. Linda did not have opportunity to control Alarco either prior to, or while, he was shooting his paintball gun, and there is no proof that any of the Hernandez defendants entered into any plan or design to shoot the paintball gun. Moreover, even if any of the Hernandez family were to be found liable, Felix would not be held vicariously liable for their acts.

Linda argues that, due to the brief time interval and the barrage of eggs being thrown towards Linda, the only option she had in preventing injury was to shout at both groups to stop; that she was not aware that the boys were in possession of paintball guns, and was only made aware during the brief altercation. Linda argues that it would be unreasonable to expect her to run through the barrage of eggs, in such a short period of time and physically

restrain Alarco from shooting his gun. Linda had no warning that Alarco would shoot his gun and had no opportunity to stop it. Therefore plaintiff's theory on landowner's duty to control guests on the premises fails.

Defendants also argue that the concerted action liability claim fails as well. Initially, the defendants argue that concerted action liability is used when the identity of the party who committed the tort is unknown, but because Alarco's identity is known, the Hernandez's should not be liable under this theory. Further, because none of the Hernandez family helped Alarco fire his gun or knew of his intention to fire his gun at people, none of them committed a tort. Therefore, these defendants should not be held liable on the theory of concerted action.

While the plaintiff concedes that individual claims against Felix should be dismissed, defendant argues that Felix should not be found liable if the other members of the Hernandez family did in fact commit a tortious act. None of these defendants who were present during the event was Felix's agent, and Felix was not aware of the boys who were on his premises and did not authorize any shooting of paintballs on his premises. Therefore since there was no agent and Felix did not authorize or consent to any tortious activity, he cannot be held vicariously liable.

DEFENDANTS' KLEIN REPLY

The Kleins argue that the plaintiff's attorney's unsubstantiated hypothesis, that the Kleins are guilty of violating Penal Law §265.05, is unavailing. The Kleins were not prosecuted for this crime and had specific rules on when Michael can use the gun; and he violated those rules. These defendants also argue that the failing to safeguard the paintball gun is devoid of evidentiary facts and does not raise a triable issue. Moreover, there is no evidentiary proof that Michael is liable under a concerted action theory because his gun was inoperable and could not have caused plaintiff's injuries. Therefore, since there is no cause of action against Michael, the negligent entrustment action against the Kleins must fail.

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

“It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (State Bank of Albany v McAuliffe, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; Zuckerman v City of New York, *supra*, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)”.

In applying the above legal principles to the facts of the case at bar, this Court has thoroughly examined the entire record, as presented, in the context of the applicable case law and statutory law.

Concerted action liability is based on the theory that those “who are in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him.” (Bichler v. Eli Lilly and Co., 55 N.Y.2d 571, 580, 436 N.E.2d 182, 450 N.Y.S.2d 776, 1982; D’Elia v. 58-35 Utopia Parkway Corp., 2007 WL 2729731, 2nd Dept., 2007; Restatement [Second] of Torts §876). In the case at bar, an issue remains as to whether defendants Eric and Brian Hernandez acted in concert with Michael Alarco during the attack on the plaintiff. To be liable under concerted action liability, a common plan need not be explicitly agreed upon by the parties. (Rodriguez v. City of New York, 35 A.D.3d 702, 704, 827 N.Y.S.2d 220, 222, 2nd Dept., 2006; Harris v. Stanley, 21 A.D.3d 612, 613, 799 N.Y.S.2d 837, 839, 3rd Dept., 2005; New York Law of Torts §10:4). Here, prior to the incident, Brian and Eric were aware that Alarco and Klein were in possession of paintball guns. The deposition transcripts conflict as to who initiated the exchange between the groups and as to how many guns were

fired. Assuming the facts in favor of the plaintiff, an issue remains whether Brian entered into an implicit agreement with Alarco, Klein, and Eric to injure the plaintiff. Brian may have played a role in the confrontation either by using his own paintball gun and/or by helping Klein with his gun. Moreover, assuming Eric suggested or encouraged Alarco to continue shooting once he had ceased, Eric had encouraged the furtherance of a tortious act. Defendant Eric argues that because the event was spontaneous there was no time to create a common plan or design to commit a tortious act. However, due to a combination of factors a trier of fact must determine if the event was so spontaneous that an implicit agreement to assault the crowd between Eric, Alarco, and Klein was impossible.

Defendant Linda Hernandez is not entitled to summary judgment. The depositions are in agreement that Linda was unaware that the boys were in the front of her house or that they were in possession of paintball guns before the confrontation began. Linda became aware of the boys and the guns only when the exchange was already in progress. However, in their depositions, Alarco and Klein both state that Linda observed the altercation for “a couple of minutes” and had been going back and forth from inside to outside of the house throughout that time. A question of fact remains as to the period of time Linda was aware of the altercation which would determine if there was sufficient time for her to implicitly agree on a common plan to injure the plaintiff. Moreover, the conflicting testimony of what Linda said to the crowd raises doubt as to Linda’s participation. Furthermore, under the landowner liability theory, Linda’s motion would fail once again. “Landowners have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control.” (D’Amico v. Christie, 71 N.Y.2d 76, 85, 524 N.Y.S.2d 1, 1987; Charlu v. Hariraj, 304 A.D.2d 515, 515, 758 N.Y.S.2d 132, 133, 2nd Dept., 2003). The conflicting deposition regarding the period of time that the altercation took place and the period of time that Linda was aware of the altercation is crucial to a determination whether or not Linda had opportunity to control the conduct of the defendants on her front stoop. Therefore a trial is necessary to resolve the factual disputes and thus summary judgment must be **denied**.

This Court, notwithstanding the lateness of the Klein’s application, and noting the lack of opposition by the plaintiff’s attorney on this point, accepts and considers this instant application. (Grande v. Peteroy, 833 N.Y.S.2d 615, 39 A.D.3d 590, 2nd Dept., 2007). A parent is responsible for his failure to exercise reasonable care in allowing his child to have a dangerous instrument. (Masone v. Gianotti, 54 A.D.2d 269, 274, 388 N.Y.S.2d 322, 325, 2nd Dept., 1976). In the case at bar, the Kleins purchased a dangerous instrument for their son, and that instrument was present when the plaintiff was injured. A question of fact

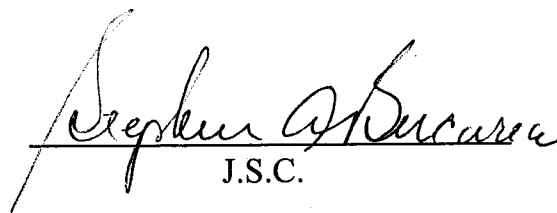
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remains as to Michael's involvement in the incident and whether his gun was used. In response to the Klein motion, the plaintiff points to the lack of evidence provided by the Kleins to demonstrate that the gun was safely guarded from Michael in their home. The lack of evidence provided by the Kleins creates a question of fact. Furthermore, the Klein's argument that they should be dismissed from the action since Michael is not liable for concerted action liability is unwarranted. The night in question has many issues that must be resolved including the extent of the participation of all defendants involved in the altercation. The Kleins cannot prevail on the argument, on this record, that Michael is not liable under the concerted action liability theory. Thus, the motion to dismiss is **denied**.

Accordingly the motion for summary judgment as to Felix Hernandez is **granted**; the motion for summary judgment as to Linda, Brian and Eric Hernandez is **denied**; the motion for summary judgment as to Paul and Mary Klein is **denied**.

Dated OCT 17 2007


J.S.C.

ENTERED

OCT 19 2007

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